REPORT
OF THE
UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
on the work of its twenty-third session

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25 June – 6 July 1990

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTY-FIFTH SESSION

SUPPLEMENT No. 17 (A/45/17)

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-third session, held at New York from 25 June to 6 July 1990.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-third session on 25 June 1990. The session was opened by Mr. Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 10 December 1985 and 19 October 1988, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: 1/

Argentina (1992), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1992), China (1995), Costa Rica (1995), Cuba (1992), Cyprus (1992), Czechoslovakia (1992), Denmark (1995), Egypt (1995), France (1995), Germany, Federal Republic of (1995), Hungary (1992), India (1992), Iran (Islamic Republic of) (1995), Iraq (1992), Italy (1992), Japan (1995), Kenya (1992), Lesotho (1992), Libyan Arab Jamahiriya (1992), Mexico (1995), Morocco (1995), Netherlands (1992), Nigeria (1995), Sierra Leone (1992), Singapore (1995), Spain (1992), Togo (1995), Union of Soviet Socialist Republics (1995), United Kingdom of Great Britain and Northern Ireland (1995), United States of America (1992), Uruguay (1992) and Yugoslavia (1992).

5. With the exception of Costa Rica, Sierra Leone and Togo, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Australia, Austria, Burkina Faso, Colombia, Congo, Democratic People's Republic of Korea, Ecuador, Finland, German Democratic Republic, Guinea, The Holy See, Indonesia, Lebanon, Liberia, Mali, Norway, Oman, Pakistan, Philippines, Poland, Republic of Korea, Romania, Rwanda, Saudi Arabia, Sweden, Switzerland, Thailand, Uganda, United Republic of Tanzania, Vanuatu, Venezuela, Viet Nam and Yemen.

7. The session was also attended by observers from the following international organizations:

(a) United Nations organs

United Nations Centre on Transnational Corporations
United Nations Conference on Trade and Development

(b) Intergovernmental organizations

Asian-African Legal Consultative Committee

(c) Other international organizations

Inter-American Bar Association
Inter-American Juridical Committee
International Chamber of Commerce

C. Election of officers 2/

8. The Commission elected the following officers:

Chairman: Mr. Michael Joachim Bonell (Italy)

Vice-Chairmen: Ms. Ana Isabel Piaggi de Vanossi (Argentina)
Mr. Christo Tepavitcharov (Bulgaria)
Ms. Zhang Yue Jiao (China)

Rapporteur: Ms. Oge Joy Sasegbon (Nigeria)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 427th meeting, on 25 June 1990, was as follows:

1. Opening of the session.
2. Election of the officers.
3. Adoption of the agenda.
4. Countertrade.
5. International payments.
6. New international economic order.
7. International contract practices.
8. Legal problems of electronic data interchange.
9. Co-ordination of work.
10. Status of conventions.
11. Training and assistance.
12. General Assembly resolutions on the work of the Commission.
13. Other business.
14. Date and place of future meetings.
15. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 438th meeting, on 6 July 1990, the Commission adopted the present report by consensus.

II. INTERNATIONAL COUNTERTRADE

11. The Commission, at its nineteenth session, held in 1986, in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), considered its future work on the topic of countertrade and requested the Secretariat to prepare a preliminary study on the subject. 3/

12. At its twenty-first session, held in 1988, the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). The Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up countertrade contracts. In order for it to decide what further action might be taken, the Commission requested the Secretariat to prepare for the Commission at its twenty-second session a draft outline of such a legal guide. 4/

13. At its twenty-second session, held in 1989, the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322). It was decided that such a legal guide should be prepared by the Commission, and the Secretariat was requested to prepare for the next session of the Commission draft chapters of the legal guide. 5/

14. At the current session, the Commission had before it a report entitled "Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters" (A/CN.9/332 and Add.1-7). The report contained a proposed structure of the legal guide (A/CN.9/332, para. 6), an outline of the chapter entitled "Introduction to legal guide" (A/CN.9/332/Add.1), and the following draft chapters: "II. Scope and terminology of legal guide" (A/CN.9/332/Add.1); "III. Contracting approach" (A/CN.9/332/Add.2); "IV. General remarks on drafting" (A/CN.9/332/Add.3); "V. Type, quality and quantity of goods" (A/CN.9/332/Add.4); "VI. Pricing of goods" (A/CN.9/332/Add.5); "IX. Payment" (A/CN.9/332/Add.6); and "XII. Security for performance" (A/CN.9/332/Add.7). Draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), was also before the Commission in some language versions but, because of its late submission, it was not considered by the Commission.

15. A summary of the discussion in the Commission on the draft chapters (A/CN.9/332/Add.1-7) is contained in annex I to the present report.

16. At the conclusion of the discussion the Commission noted that there had been general agreement with the overall approach taken by the Secretariat in the draft chapters, both as to the structure of the legal guide and as to the nature of the description and advice contained therein.

17. The Commission then considered the procedure that should be followed to complete the preparation of the legal guide. It was decided that the Secretariat should complete the preparation of the remaining draft chapters and submit them, together with draft chapter VII (A/CN.9/332/Add.8), to a working group for consideration. While there was general agreement that it would be preferable if the draft chapters could be submitted to the Working Group on the New International Economic Order, it was recognized that that Working Group was currently fully occupied and that, as a result, the draft chapters might be submitted to the

Working Group on International Payments, which would be available in 1991. In view of the time it would take the Secretariat to complete the preparation of the draft chapters, it was agreed that the meeting of the Working Group might be scheduled for September 1991.

18. The Commission decided that the Secretariat should redraft the chapters submitted to it at its current session and the chapters to be submitted to the Working Group in the light of the discussion at the current session and at the session of the Working Group and should submit the final text of the legal guide to the Commission at its twenty-fifth session, to be held in 1992.

III. INTERNATIONAL PAYMENTS

19. The Commission decided, at its nineteenth session, in 1986, to begin the preparation of model rules on electronic funds transfers and entrusted that task to the Working Group on International Payments. 6/

20. The Working Group commenced its work at its sixteenth session by considering, on the basis of a note by the Secretariat, a number of legal issues that might be considered for inclusion in the model rules (see A/CN.9/297). The Working Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session.

21. At its seventeenth session, the Working Group considered the draft provisions prepared by the Secretariat, and at the close of that session the Working Group requested the Secretariat to prepare a revised draft of the Model Rules (see A/CN.9/317).

22. At its eighteenth session, the Working Group considered the provisions that had been redrafted by the Secretariat and made the following decisions: that the provisions should be prepared in the form of a model law; that the scope of application of the model law should be limited to those credit transfers that were international in nature; and that the model law should apply to all international credit transfers without regard to whether they were in electronic or paper-based form (A/CN.9/318). In view of the last-mentioned decision, the Working Group decided that the title of the draft provisions should be "draft Model Law on International Credit Transfers".

23. At its current session, the Commission had before it the reports of the Working Group on the work of its nineteenth and twentieth sessions (A/CN.9/328 and A/CN.9/329). The reports indicated that the Working Group had continued its consideration of the draft Model Law.

24. The Commission noted that at the close of the twentieth session of the Working Group the delegation of the United States of America had expressed its concern about the direction that the Model Law project had taken and had suggested the possibility of separating the Model Law into two parts, one applicable to high-speed electronic systems and the other applicable to slower systems.

25. The Commission noted that the United States of America had submitted a specific proposal to implement its suggestion and that that proposal would be before the Working Group at its next session, to be held in New York from 9 to 20 July 1990. The Commission expressed its confidence that the Working Group would be able to resolve the outstanding issues before it so that a text could be presented to the Commission at its twenty-fourth session, to be held in 1991.

IV. PROCUREMENT

26. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. 7/ The Working Group commenced its work on the topic at its tenth session, held at Vienna from 17 to 25 October 1988 (A/CN.9/315), by considering a study of procurement prepared by the Secretariat. At the close of its tenth session the Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

27. At its current session, the Commission had before it the report of the Working Group on the work of its eleventh session, held in New York from 5 to 16 February 1990 (A/CN.9/331), at which the Working Group considered the draft of a model law on procurement prepared by the Secretariat. 8/ At the close of its eleventh session the Working Group requested the Secretariat, for the twelfth session, to prepare draft provisions of the model law dealing with redress for actions and decisions taken by the procuring entity contrary to the provisions of the model law and to revise the text of the draft model law to take into account the discussions and decisions at the eleventh session (A/CN.9/331, para. 222).

28. During the discussion in the Commission the view was expressed that the work on the model law should take into account its possible relevance to procurement conducted by private companies. It was stated that for certain large purchases such companies were increasingly resorting to the types of procedures laid down in the draft model law.

29. The Commission expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously.

V. GUARANTEES AND STAND-BY LETTERS OF CREDIT

30. The Commission, at its twenty-second session, in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken and entrusted that task to the Working Group on International Contract Practices. 9/

31. At its current session, the Commission had before it the report of the Working Group on the work of its thirteenth session (A/CN.9/330). The Commission noted that the Working Group had commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Commission also noted that the Working Group had engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit.

32. The Commission further noted that the Working Group had requested the Secretariat to submit to the next session of the Working Group, to be held at Vienna from 3 to 14 September 1990, a first draft set of articles, with possible variants, on the above issues as well as a note discussing other possible issues to be covered by the uniform law.

33. The Commission expressed its appreciation for the progress made by the Working Group so far and requested it to continue carrying out its task expeditiously.

VI. LEGAL PROBLEMS OF ELECTRONIC DATA INTERCHANGE

34. The Commission, at its seventeenth session, in 1984, decided to place the subject of the legal implications of automatic data processing for the flow of international trade on its programme of work as a priority item. 10/ It did so after considering a report of the Secretary-General entitled "Legal aspects of automatic data processing" (A/CN.9/254), which identified several legal issues, relating, namely, to the legal value of computer records, the requirement of a writing, authentication, general conditions and bills of lading.

35. At its eighteenth session, in 1985, the Commission had before it a report by the Secretariat entitled "Legal value of computer records" (A/CN.9/265). The report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. At that session, the Commission recommended to Governments, inter alia, that they should eliminate unnecessary obstacles to the use of computers in trade, and recommended to international organizations elaborating legal texts related to trade that they take account of the need to eliminate unnecessary obstacles to the use of computers in trade. 11/

36. At its nineteenth and twentieth sessions, in 1986 and 1987, the Commission had before it two further reports on the legal aspects of automatic data processing (A/CN.9/279 and A/CN.9/292), which described and analysed the work of international organizations active in the field of automatic data processing.

37. At its twenty-first session, in 1988, the Commission considered a proposal to examine the need to provide for the legal principles that would apply to the formation of international commercial contracts by electronic means. It was noted that there currently existed no refined legal structure for the important and rapidly growing field of formation of contracts by electronic means and that future work in that area could help to fill a legal vacuum and to reduce uncertainties and difficulties encountered in practice. The Commission requested the Secretariat to prepare a preliminary study on the topic. 12/

38. At the current session, the Commission had before it the report that it had requested, entitled "Preliminary study of legal issues related to the formation of contracts by electronic means" (A/CN.9/333). The report noted that in prior reports the subject had been considered under the general heading of "automatic data processing" (ADP) but that, in recent years, the term generally used to describe the use of computers for business applications had been changed to "electronic data interchange" (EDI).

39. The report summarized work that had been undertaken in the European Communities and in the United States of America on the requirement of a writing as well as other issues that had been identified as arising in the formation of contracts by electronic means. The efforts to overcome some of those problems by the use of model communication agreements was also discussed. The report suggested that the Secretariat might be requested to submit a further report to the next session of the Commission indicating developments in other organizations during the year relevant to the legal issues arising in EDI. That report might also analyse

existing and proposed model communication agreements with a view to recommending whether a model agreement should be available for world-wide use and, if so, whether the Commission should undertake its preparation.

40. The Commission expressed its appreciation for the report submitted to it and requested the Secretariat to continue its examination of the legal issues related to the formation of contracts by electronic means and to prepare for the Commission at its twenty-fourth session the report that had been suggested. The Commission expressed the wish that the report would give it the basis on which to decide at that time what work might be undertaken by the Commission in the field. A number of delegations expressed the view that the Commission should give priority to the topic. However, a view was also expressed that work on that topic should not have priority over other subjects on the Commission's agenda.

VII. CO-ORDINATION OF WORK

41. The Commission had before it a report of the Secretary-General on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/336). That report updated the information contained in a report on the same subject submitted to the Commission at its twenty-second session (A/CN.9/324) and dealt with the activities under the following headings: international commercial contracts in general; commodities; industrialization; transnational corporations; transfer of technology; industrial and intellectual property law; international payments; international transport; international commercial arbitration; private international law; trade facilitation; and other topics of international trade law, congresses and publications.

42. The Commission noted that the report was a valuable compilation of information on the activities of international organizations related to the harmonization and unification of international trade law and that it assisted the Commission in developing its own programme of work and fostering co-ordination in the activities of the various international organizations.

VIII. STATUS OF CONVENTIONS

43. The Commission considered the state of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods ("the Limitation Convention"), the Protocol amending the Limitation Convention, the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention") and the United Nations Convention on International Bills of Exchange and International Promissory Notes. The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. The Commission had before it a note by the Secretariat on the status of those Conventions and of the Model Law as of 16 May 1990 (A/CN.9/337).

44. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-second session, in 1989, the German Democratic Republic had ratified the Limitation Convention and its amending Protocol. The Commission noted with pleasure that, since the previous session, the Protocol amending the Limitation Convention had also been ratified by Czechoslovakia. As a result of those actions seven States were now parties to the Limitation Convention as amended by the Protocol, while four States were parties to the unamended Convention.

45. The Commission took pleasure in noting that an additional three States, namely, Burkina Faso, Kenya and Lesotho, had acceded to the Hamburg Rules, bringing the total number of parties to 17. The Secretary of the Commission reaffirmed the expectation of the Secretariat that the additional three ratifications or accessions necessary for the Convention to come into force would take place in the near future.

46. With respect to the United Nations Sales Convention, the Commission noted with satisfaction that the following seven additional States had become parties to the Convention: Byelorussian Soviet Socialist Republic, Chile, Czechoslovakia, Germany, Federal Republic of, Iraq, Switzerland and Ukrainian Soviet Socialist Republic. The total number of parties to the Convention was currently 26. The representatives of Bulgaria and of the Union of Soviet Socialist Republics informed the Commission that the necessary acts concerning accession to the Convention had been adopted and that the instruments of accession would be deposited shortly. Representatives and observers of a number of other States reported that official action was being taken that was expected to lead to the accession to the Convention in the near future.

47. The Commission noted with pleasure that Canada, the Union of Soviet Socialist Republics and the United States of America had signed the United Nations Convention on International Bills of Exchange and International Promissory Notes.

48. With respect to the UNCITRAL Model Law on International Commercial Arbitration, the representatives and observers of a number of States informed the Commission that legislation based on the Model Law was being prepared.

49. The Commission took note of a request by the Secretary that the Secretariat be provided with copies of legislation by which legal texts developed by UNCITRAL had been brought into force or had been implemented.

IX. TRAINING AND ASSISTANCE

50. The Commission had before it a note by the Secretariat that set out the activities that had been carried out in respect of training and assistance during the prior year as well as possible future activities in that field (A/CN.9/335). The note indicated that since the Commission had stated at its twentieth session, in 1987, "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past", 13/ the Secretariat had endeavoured to devise a more extensive programme of training and assistance than had been previously carried out. In doing so the Secretariat had kept in mind the decision of the Commission at its fourteenth session, in 1981, that a major purpose of the training and assistance activities should be the promotion of the texts that had been prepared by the Commission. 14/

51. The Commission had been informed at its twenty-second session, in 1989, that the Secretariat was planning to organize a seminar, to be held at New Delhi in October 1989, jointly with the Asian-African Legal Consultative Committee (AALCC). The seminar, which was also sponsored by UNCTAD and the International Institute for the Unification of Private Law (UNIDROIT), was held from 12 to 16 October 1989.

52. The purpose of the seminar was to promote awareness in the Asian States members of AALCC of the conventions and other legal texts prepared by the sponsoring organizations. The majority of the participants were from the embassies of the respective States at New Delhi. In addition, the seminar was attended by members of the Indian Council of Arbitration.

53. A seminar hosted by the Government of Guinea and organized in conjunction with the Ministry of Foreign Affairs of that country was held at Conakry from 27 to 29 March 1990. Approximately 120 participants from interested ministries, the university and the private sector attended the seminar, which was intended to familiarize a broad cross-section of the local legal community with the UNCITRAL legal texts. It was noted that national seminars of that type were an effective way of informing a significant number of individuals in a given country of the work of the Commission.

54. At its twenty-second session, in 1989, the Commission had been informed of a seminar on the work of the Commission planned to be held in Moscow in 1990. Twenty-one participants from developing countries attended the seminar, which was financed from a trust fund established by the Union of Soviet Socialist Republics with the United Nations Development Programme (UNDP) for the training of individuals from developing countries. The seminar, which was hosted by the School of International Private and Civil Law and the School of International Business of the Moscow State Institute for Foreign Relations, took place from 17 to 21 April 1990.

55. The Commission noted that members of the UNCITRAL secretariat had participated as speakers in a number of other seminars, conferences, courses and professional meetings at which UNCITRAL legal texts were presented for examination and discussion.

56. The Secretariat reported that it was holding discussions for further seminars to be held in developing countries in different parts of the world. A seminar for the 17 francophone States of North and West Africa was planned for the fourth

quarter of 1990. Tentative plans had been made with the Comisión Centroamericana de Transporte Marítimo (COCATRAM) to sponsor a series of seminars on the Hamburg Rules in each of the States members of COCATRAM in September 1990. The Secretariat was also holding discussions with the secretariat of the South Pacific Bureau for Economic Co-operation (SPEC) with a view to sponsoring a seminar in the Pacific region some time in 1991.

57. The Secretariat reported that, as announced to the Commission at its twenty-second session, it intended to organize the fourth UNCITRAL Symposium on International Trade Law on the occasion of the twenty-fourth session of the Commission, to be held in 1991.

58. The Commission expressed its appreciation to all those who had participated in the organization of the various seminars, and in particular to the Asian-African Legal Consultative Committee and the Moscow State Institute for Foreign Relations for their aid in organizing the seminars at New Delhi and Moscow. The Commission also expressed its appreciation to the Governments of Canada, Finland and Switzerland, whose generous contributions to promote the work of the Commission, made on a multi-year basis, had permitted the Secretariat to plan and carry out the expanded programme of seminars. Appreciation was expressed to the Government of the Union of Soviet Socialist Republics for its aid in securing the financing of the seminar in Moscow from the USSR-UNDP Trust Fund. Appreciation was also expressed to the Government of France for its contribution that would make possible the holding of the seminar for the francophone States of North and West Africa, as well as to the Government of Luxembourg for its contribution for that seminar.

59. The Commission noted that the continuation, and further expansion, of the programme of training and assistance depended on the continued availability of sufficient financial resources. It further noted that those resources were not available from the regular budget. Contributions made to the UNCITRAL Trust Fund on a multi-year basis were of particular value in that they permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity.

60. The Commission also noted that the Secretariat had announced plans for a number of individual seminars to be held during the next year, including the fourth UNCITRAL Symposium on International Trade Law, mentioned in paragraph 57 above. The Commission encouraged all States to consider making contributions towards the financing of one or more of those individual seminars, if an unrestricted contribution to the UNCITRAL Trust Fund was not possible.

61. The Commission expressed its approval of the activities of the Secretariat that had led to the expanded programme of seminars and symposia. It requested the Secretariat to continue its efforts to secure the financial, staff and administrative support necessary to place the programme on a firm and continuing basis.

X. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

62. The Commission took note with appreciation of General Assembly resolution 44/33 of 4 December 1989 on the report of the United Nations Commission on International Trade Law on the work of its twenty-second session and of the decision of the General Assembly expressed in that resolution to convene an international conference of plenipotentiaries at Vienna from 2 to 19 April 1991 to consider the draft convention on the liability of operators of transport terminals in international trade.

B. Convention on the Limitation Period in the International Sale of Goods

63. At its twenty-second session, in 1989, the Commission had noted that the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) had been established in the five languages in which the diplomatic conference had been held and that, since Arabic had not been one of the languages of the conference, the Convention did not exist in that language. However, the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980) had been adopted in Arabic. At that session the Commission had decided to request the preparation of an Arabic language version of the Convention as amended by the Protocol. 15/ At the current session the Commission noted that in paragraph 9 of resolution 44/33 the General Assembly had approved "the initiative of the Commission to have prepared an official Arabic language version of the Convention ...".

64. The Commission had before it at the current session a proposed text of the Convention as amended as translated into Arabic by the Secretariat (A/CN.9/334). The translation was reviewed and corrected by representatives of the interested delegations in co-operation with the Arabic Translation Service. The Commission requested the Secretary-General as depositary of the Convention to circulate the Arabic language version of the Convention as amended, and as reproduced in annex II to the present report, for comments prior to its publication as the official Arabic version of the Convention as amended.

C. Membership of the Commission and of working groups

65. It was noted that at its twenty-first session, in 1988, the Commission, on the basis of a note entitled "Working methods of the Commission" (A/CN.9/299), had considered the question of a possible increase in the membership of the Commission. At that session the Commission had taken no decision on the question and had agreed to reconsider the matter at its twenty-third session. 16/ At the current session, the Commission decided to postpone the consideration of the question to a later session.

66. It was also noted that the note submitted to the Commission at its twenty-first session had in addition set out the history of the Commission's decisions as to the membership of its working groups (A/CN.9/299, paras. 13-31).

At various times the size of the working groups had been increased so that currently all three working groups were composed of all States members of the Commission. The Commission noted that when it had decided at its twenty-first session to postpone consideration of the size of the Commission, it had also decided to postpone consideration of the membership of the working groups.

67. At the current session, it was suggested that in some cases it was important that all States members of the Commission should be members of a working group, while in other cases it might be sufficient if the working group was composed of a limited number of States. It was stated that, since active participation in a meeting of a working group often required the travel of an expert from the country concerned to New York or Vienna, the cost to the member States was increased when the working groups were composed of all member States of the Commission. It was suggested that the optimal size of a working group depended upon factors such as the type of legal text under consideration and the kinds of issues that were to be resolved in the working group.

68. In reply it was stated that the policy of inviting all States to attend sessions of the Commission and its working groups as observers was an indication of the importance placed on the participation of all interested States in every stage of the work of the Commission, including the preliminary stages in the development of the legal texts it prepared. It was stated that even when representatives of States, whether members of the Commission or observers, were passive in the conduct of a meeting, their attendance and the reports they submitted to their Governments were important elements in the world-wide awareness and acceptability of the Commission's work.

69. In view of the discussion, the Commission decided that it would not change the current policy that its three working groups should be composed of all States members of the Commission. It noted that when a working group was given a new mandate, it would be possible, if it seemed appropriate at the time, to reconsider the size of that working group for the period of the specific mandate.

D. United Nations Decade of International Law

70. The Commission noted that the General Assembly, in its resolution 44/23 of 17 November 1989, had declared the period 1990-1999 as the United Nations Decade of International Law. In that resolution, the General Assembly had requested the Secretary-General to seek the views of appropriate international bodies on the programme for the Decade and on appropriate action to be taken during the Decade. The Commission had before it a note by the Secretariat that brought the resolution to the attention of the Commission (A/CN.9/338).

71. The Commission observed that the programme for the Decade should take account of the fact that international trade law was an important and integral part of international law; in particular, the Commission's work was an important element in strengthening the rule of law in international economic relations.

72. The discussion in the Commission concentrated on how the Commission itself might take the occasion of the Decade to further strengthen and develop its programme of work. Several types of activities were identified in the discussion

as being particularly appropriate for inclusion in the programme for the Decade. One activity was to strengthen the teaching, study, dissemination and wider appreciation of the law of international trade. Another activity was the promotion of acceptance of legal texts emanating from the work of the Commission and from the work of other intergovernmental and non-governmental organizations active in the area of international trade law. The observation was made that in respect of international law in general, and international trade law in particular, the wider adoption and effective implementation of existing texts was often of greater value than was the elaboration of new texts. The Commission noted that its activities in respect of the teaching, study, dissemination and wider appreciation of international trade law, with the associated promotion of the adoption and use of existing texts, had been more limited than was desirable because of the limited resources that had been available for them.

73. The Commission noted that the suggested activities relating to the teaching, study, dissemination, wider appreciation and promotion of international trade law would have their impact in all regions, but that they would be of greatest significance in developing countries. In the same spirit, a suggestion was made that an attempt should be made to find a way to finance the travel of experts from developing countries, and especially from States members of the Commission, to the sessions of the Commission and its working groups so that those States would be in a better position to contribute actively to the creation of international trade law.

74. In respect of the future activities of the Commission in the preparation of legal texts, it was suggested that the Commission could contribute to the Decade by undertaking work on a subject that was of underlying fundamental significance for the further development of the law of international trade, such as the formulation of general principles of contract law or of general principles in particular areas of international trade law. It was also suggested that the Secretariat might review the proposals made in past years for the programme of work that had not been acted upon, as well as subjects on which work had begun but had been terminated prior to the adoption of a legal text, to determine whether some of those items might now be appropriate for the current programme of work. Under one suggestion the Secretariat would be requested to prepare a proposed programme of work for the Commission for the period of the Decade. Furthermore, it was suggested that the preparatory work by the Secretariat relating to the Decade should address the question of the harmonization between the universal and the regional codification of international trade law. It was proposed that one plenary session of the Commission should be dedicated to a review of developments in the field of international trade law from 1980 onward.

E. UNCITRAL Yearbook and bibliography

75. The Commission recalled that at its twenty-second session it had expressed its concern about the long delay in the publication of the Yearbook of the United Nations Commission on International Trade Law and that it had requested the Secretariat to take the necessary actions so that the Yearbook for a given year would be published by the end of the following year. 17/ The Commission noted with satisfaction that considerable progress had been made towards eliminating the long delay in the publication of the Yearbook. It further noted that it was expected that the 1989 Yearbook would be published in all languages by the end of 1990, thereby meeting the desired publication schedule. The Commission expressed its appreciation for the efforts of the Secretariat in this regard, including the

efforts of the publication services at Vienna. The Secretariat was requested to continue its efforts to ensure that the Yearbook for a given year would be published by the end of the following year.

76. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/339).

F. Date and place of the twenty-fourth session of the Commission

77. It was decided that the Commission would hold its twenty-fourth session from 10 to 28 June 1991 at Vienna.

G. Sessions of the working groups

78. The Commission recalled its decision that the Working Group on International Contract Practices would hold its fourteenth session from 3 to 14 September 1990 at Vienna, and agreed that the Working Group would hold its fifteenth session from 13 to 24 May 1991 in New York (subject to confirmation in late August 1990) and its sixteenth session from 4 to 15 November 1991 at Vienna.

79. The Commission recalled its decision that the Working Group on the New International Economic Order would hold its twelfth session from 8 to 19 October 1990 at Vienna and agreed that the Working Group would hold its thirteenth session from 15 to 26 July 1991 in New York and its fourteenth session from 2 to 13 December 1991 at Vienna.

80. The Commission noted that the Working Group on International Payments would hold its twenty-first session from 9 to 20 July 1990 in New York and its twenty-second session from 26 November to 7 December 1990 at Vienna. The Commission decided that the twenty-third session would be held from 2 to 13 September 1991 in New York to consider the remaining draft chapters of the legal guide on drawing up contracts in international countertrade transactions.

Notes

1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the Assembly at its fortieth session on 10 December 1985 (decision 40/313) and 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its fortieth session will expire on the last day prior to the opening of the twenty-fifth regular annual session of the Commission, in 1992, while the term of those members elected at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995.

2/ The elections took place at the 427th, 432nd and 433rd meetings, on 25, 27 and 28 June. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the

bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 14) Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970 (United Nations publication, Sales No. E.71.V.1, part two, I, A, para. 14).

3/ Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

4/ Ibid., Forty-third Session, Supplement No. 17 (A/43/17), paras. 32-35.

5/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), paras. 245-249.

6/ Ibid., Forty-first Session, Supplement No. 17 (A/41/17), para. 230.

7/ Ibid., para. 243.

8/ A/CN.9/WG.V/WP.24, with a commentary in A/CN.9/WG.V/WP.25.

9/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

10/ Ibid., Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 136.

11/ Ibid., Fortieth Session, Supplement No. 17 (A/40/17), para. 360. The recommendation was endorsed by the General Assembly in its resolution 40/71, para. 5 (b), of 11 December 1985.

12/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 46 and 47, and ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 289.

13/ Ibid., Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

14/ Ibid., Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 109.

15/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 264.

16/ Ibid., Forty-third Session, Supplement No. 17 (A/43/17), paras. 111-116.

17/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 291.

ANNEX I

Discussion on the draft legal guide on drawing up contracts in international countertrade transactions

General discussion

1. The Commission engaged in a general discussion of the purpose, approach and structure of the draft legal guide on drawing up contracts in international countertrade transactions (A/CN.9/332 and Add.1-7).

2. The Commission reviewed the rationale behind its work on the legal guide. On the one hand, it was stated that, due to economic difficulties of many countries, parties engaged in countertrade arrangements and that those parties often did not find optimal solutions to contractual issues that arose in such arrangements. As a result, it was considered that a legal guide on drawing up contracts in international countertrade would be useful to participants in that type of trade. On the other hand, it was stated that countertrade was an inefficient manner to carry on international trade and was detrimental to both developed and developing States in that it distorted competition in international markets as well as the terms of trade of the participants themselves. In the light of that observation, views were expressed that the legal guide should be drafted in such a way that it would not indicate specific approval of that type of trade or encourage parties to engage in it.

3. It was noted that the Economic Commission for Europe (ECE) was preparing a guide on legal aspects of new forms of industrial co-operation in East-West trade and that a part of that guide was devoted to legal aspects of international counter-purchase contracts and international buy-back contracts. The Commission was of the view that the legal guide to be prepared by it would not duplicate the work of ECE since the membership of the Commission was universal, the documents of the Commission were circulated universally and the treatment of legal issues in the draft chapters under discussion was considerably more detailed than the treatment of such issues in the ECE guide. It was suggested that in its work on the legal guide the Commission should take into consideration solutions adopted in the ECE guide.

4. The Commission was agreed that the legal guide to be prepared should not formulate rules and instructions to be followed in drawing up countertrade transactions. Rather, it should provide an analysis of legal issues that arose in international countertrade transactions, provide possible contractual solutions to such issues and give guidance as to the implications of the various solutions.

5. It was suggested that the legal guide should address the question of the legal rules applicable to contracts involved in a countertrade transaction and in that context it should discuss the applicability of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereafter referred to as "United Nations Sales Convention").

6. Suggestions were made to facilitate the use of the legal guide by such means as a chapter summary at the beginning of each chapter, a subject-matter index, check-lists of contractual issues that should be borne in mind by the parties, graphic illustrations and illustrative contract provisions. It was suggested that

illustrative contract provisions and graphic illustrations could be provided at the next stage of preparing draft chapters, whereas the summaries, index and check-lists should be prepared at a later stage of the work.

7. The Commission was of the view that the structure of the legal guide as set out in paragraph 6 of A/CN.9/332 was acceptable.

I. INTRODUCTION TO LEGAL GUIDE (A/CN.9/332/Add.1)

8. The Commission noted that the legal guide would have an introductory chapter describing the origin, purpose, approach and structure of the guide and that that chapter would be drafted at a later stage.

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE (A/CN.9/332/Add.1)

A. Transactions covered

9. It was noted that the description in paragraph 1 of draft chapter II of the transactions to be covered in the legal guide was not intended to serve as a definition of countertrade, but rather to delimit the scope of the legal guide. It was suggested that the term "international contractual arrangements" as used in paragraph 1 to refer to countertrade transactions might be understood as limiting the scope of the legal guide to contracts that were enforceable. It was suggested that the description should make it clear that the legal guide covered also commitments that might not be enforceable as contracts. (As to the discussion on the types of commitments to be dealt with in the legal guide, see para. 24 below.)

10. The view was expressed that paragraph 1 of the draft chapter should mention the economic reasons that parties frequently had for engaging in countertrade. The prevailing view was that the legal guide was not an appropriate place for such a discussion. There was support for the view that paragraph 1 should give a clearer indication that the reference to "goods" was intended to refer not only to manufactured goods but also to raw materials. A related suggestion was that section B of draft chapter II should be expanded to provide definitions of terms such as "goods" and "technology" that appeared frequently in the draft legal guide.

11. It was suggested that paragraphs 2 to 7 of draft chapter II, which described the differing features of countertrade transactions, should be made more concise. In particular, it was suggested that paragraph 5 could be deleted so as to avoid a discussion of economic reasons for engaging in countertrade transactions. According to that view, mention could be made of the potential contractual implications of differing degrees of interest of the parties at relevant points in the legal guide. Another view was that the limited reference to economic factors in paragraph 5 was useful to explain that the economic position of the parties might affect the negotiation and drafting of contractual provisions.

B. Terminology

12. The Commission noted that the purpose of section B.1 of draft chapter II was not to provide a precise delimitation of the scope of the legal guide or to provide an exhaustive list of the commercial types of countertrade transactions, but to

establish a terminology that would be used when the discussion in the legal guide was relevant to a particular type of countertrade. Possible improvements discussed by the Commission included a suggestion that a clearer distinction should be drawn between counter-purchase and offset and a suggestion that the definition of offset in paragraph 13 of the draft chapter should indicate clearly that the legal guide would generally not focus on the commitment of a party to the transaction to make an investment.

13. The view was expressed that the terminology in section B.2 of draft chapter II should be based on the assumption that in countertrade transactions one of the parties, or its Government, typically required the other party to accept a countertrade commitment. The prevailing view was that the existing terminological approach in the draft legal guide was preferable because terminology based on such an assumption would draw the legal guide into a discussion of underlying economic factors and because the distinction that such an assumption would introduce would not be particularly useful in describing the legal issues considered in the legal guide.

14. It was decided to align the description of the term "countertrade agreement" as it appeared in paragraph 19 of draft chapter II with the decision of the Commission concerning the types of countertrade commitments on which the legal guide should focus (see para. 24 below).

15. There was support for a suggestion that paragraph 23 of the draft chapter defining the concept of "countertrade transaction" should make clear that the sources of the rights and obligations of the parties were the countertrade agreement and the supply contracts. It was suggested that the definition of "countertrade transaction" should precede the definition of "countertrade agreement" in paragraph 19 of the draft chapter.

C. Focus on issues specific to countertrade

16. The Commission was in agreement with the approach outlined in section C of draft chapter II, namely, that the legal guide should focus on issues specifically relevant to drawing up countertrade agreements.

D. Governmental regulations

17. It was noted that paragraph 27 of draft chapter II made a useful distinction between governmental regulations specific to countertrade and governmental regulations of a more general character that were applicable to countertrade transactions. The view was expressed that an illustrative list of such generally applicable regulations (e.g., export regulations, customs requirements and competition law) would be helpful. The Commission agreed that chapter XIV, "Choice of law", was the appropriate place for a more extensive discussion on that point. A suggestion to include in the legal guide a section indicating which States required their nationals to resort to countertrade was not adopted.

III. CONTRACTING APPROACH (A/CN.9/332/Add.2)

A. Choice of contract structure

18. While it was understood that the legal guide was not intended to provide guidance to parties on obtaining trade financing, the Commission agreed that the legal guide should indicate that the choice of a particular contractual structure might affect the ability of a party to obtain financing or export credit insurance. That would be the case, for example, where a trade financing institution would hesitate to finance the shipment in one direction or insure payment claims arising from the shipment if it appeared that the payment for that shipment might be affected by circumstances involving a shipment in the other direction. Such an indication could be placed in paragraph 1 as well as at other relevant points in draft chapter III.

19. The deliberations by the Commission on paragraphs 8 and 9 of draft chapter III indicated that the description of a merged contract needed to be made more precise. It was suggested that the second sentence of paragraph 9 should make it clear that non-delivery, refusal to take delivery and non-payment were examples of non-performance of a contract. It was further suggested that the legal guide should address the possible effects of various types of non-performance of a contract obligation on other contract obligations.

20. The Commission was of the view that additional clarity and alignment of language was desirable in paragraphs 9 and 17 of draft chapter III where the impact of the choice of contractual approach on the interdependence of the obligations of the parties was discussed. It was generally felt necessary to emphasize that the applicable law might be uncertain on that point and that it was therefore advisable for the parties to express clearly the desired degree of interdependence.

21. The Commission noted that the advice in paragraph 13 of draft chapter III concerning the desirability of setting out to the extent possible the terms of the future supply contract in the countertrade agreement was not intended to be a statement of legal doctrine concerning the enforceability of the countertrade commitment or of the essential elements of a countertrade agreement. It was a statement of the commercial reality that the more the terms of the future contract were set out in the countertrade agreement, the more likely it was that the parties would successfully conclude the supply contract in the future.

22. The Commission was agreed that a statement should be added to paragraph 13 of draft chapter III that the time period in which the supply contract should be concluded was one of the potentially important elements to be settled in the countertrade agreement.

23. It was suggested that the meaning of the expression "mechanisms for monitoring and recording the level of trade" in paragraph 19 of draft chapter III should be clarified.

B. Contents of countertrade agreement

24. In reviewing paragraph 22 of draft chapter III, the Commission considered whether the legal guide should focus only on those countertrade agreements that contained a firm commitment to conclude a future contract or whether the legal

guide should also discuss countertrade agreements containing a lower degree of commitment (e.g., a commitment merely to negotiate or to exercise "best efforts" to conclude a supply contract). In support of the broader approach, it was stated that in practice commitments of the "best efforts" type were used and that guidance should be given to the parties as to the implications of such commitments. The prevailing view, however, was that the legal guide should focus on countertrade agreements involving a firm countertrade commitment. In support of the narrower approach it was said that only firm commitments raised the kinds of issues that should be discussed in the legal guide. It was noted that one of those issues might be whether a given commitment, though firm, was legally enforceable (see para. 9 above). The Commission also noted that a focus on firm commitments would be in line with the approach taken in the ECE guide.

25. It was noted that paragraphs 22 to 33 of draft chapter III served as a listing of possible issues to be dealt with in the countertrade agreement and that a more extensive discussion would be found in the chapters devoted to the individual issues. Suggestions were made that section B of draft chapter III should refer to the question of the legality of penalty clauses and of clauses restricting the right of a purchaser to resell the countertrade goods. It was suggested that the parties should be encouraged in paragraph 32 to agree on the law applicable to the countertrade agreement and to the future supply contracts.

C. Countertrade commitment

26. It was noted that paragraphs 37 to 42 of draft chapter III would have to be reviewed in the light of the decision to focus on countertrade transactions involving a firm commitment to enter into supply contracts (see para. 24 above).

27. As to the second sentence of paragraph 46 of draft chapter III, it was stated that the legal guide should not suggest either that a supply contract would necessarily have to be signed to be enforceable or that an additional written instrument would necessarily be required where the parties already agreed in the countertrade agreement on the essential terms of the future supply contract.

28. In the discussion of paragraph 61 of draft chapter III, the view was expressed that the legal guide should discourage clauses in the countertrade agreement empowering one of the parties to determine a term of one of the supply contracts. It was said that such clauses would not be recognized in some legal systems. The prevailing view was that the legal guide should, with an appropriate caveat, address such clauses since they were used in certain circumstances. It was suggested that the conditions under which such clauses would be valid in some legal systems should be expressed more clearly. It was also suggested that the term "arbitrary" in the third sentence of paragraph 61 should be replaced by the term "unilateral".

IV. GENERAL REMARKS ON DRAFTING (A/CN.9/332/Add.3)

29. The Commission noted that draft chapter IV, while generally not containing information specific to countertrade contracts, would be useful to practitioners drawing up countertrade contracts. It was also noted that the draft chapter was modelled on a similar chapter contained in the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (A/CN.9/SER.B/2, United Nations Publication, Sales No. E.87.V.10).

A. General remarks

30. It was suggested that paragraph 3 of draft chapter IV should urge the parties to conclude countertrade contracts in writing. It was further suggested that the last sentence of paragraph 3 needed to be aligned with article 29 (2) of the United Nations Sales Convention so as to avoid suggesting that oral modifications were necessarily invalid when the parties had agreed that modifications should be in writing.

31. The view was expressed that the parties should be urged to clarify the relationship between contract documents on the one hand and oral exchanges, correspondence and draft documents on the other. It was also suggested that the last sentence of paragraph 4 of draft chapter IV, concerning the significance of oral exchanges and correspondence, needed to be redrafted in order to take account of article 8 of the United Nations Sales Convention. Another suggestion was that paragraph 4 might be superfluous in view of paragraph 5 of draft chapter IV.

32. It was suggested that a reference should be made in paragraph 6 of draft chapter IV to the advisability of specifying the applicable law in the countertrade agreement.

33. A view was expressed that paragraph 8 of draft chapter IV concerning introductory recitals should be deleted because the legal guide should encourage countertrade parties to draft clear contractual terms and not to rely on recitals to interpret unclear terms. The prevailing view was that the paragraph should be retained. In support of that view it was stated that introductory recitals might be useful in interpreting the terms of the contract. It was suggested that the significance of various kinds of statements that might be made in introductory recitals should be explained.

B. Language

34. The Commission agreed with a proposal that paragraph 11 of draft chapter IV should be expanded to advise parties to consider the languages in which annexes to the countertrade agreement (e.g., technical specifications) were to be drawn up and to agree in advance on who would pay for any translations that might be necessary. It was pointed out that such annexes were often lengthy and that it might be appropriate for the annexes to be in a language other than that of the countertrade agreement.

C. Parties to transaction

35. It was suggested that paragraph 14 of draft chapter IV should point out that special formalities for the conclusion of a countertrade agreement or of a supply contract might be required if one of the parties was a governmental agency. It was also suggested that the legal guide should advise parties negotiating with governmental agencies to pay attention to the question of a dispute settlement clause, including the question of a waiver of sovereign immunity and consent to arbitration.

D. Notifications

36. An additional issue proposed for coverage in section D of draft chapter IV was the place to which notifications were to be sent.

E. Definitions

37. A proposal was made that the legal guide should make a stronger recommendation than that currently made in the first sentence of paragraph 19 of draft chapter IV that the countertrade agreement should define key expressions or concepts used in the countertrade agreement itself or to be used in the supply contracts.

V. TYPE, QUALITY AND QUANTITY OF GOODS (A/CN.9/332/Add.4)

A. General remarks

38. The Commission suggested that the third sentence of paragraph 1 of draft chapter V should be revised in line with the observation made in respect of paragraph 13 of draft chapter III (see para. 21 above).

B. Type of goods

39. There was support in the Commission for a suggestion that section B of draft chapter V should make appropriate mention of special issues raised when the subject-matter of the countertrade commitment was technology or services.

40. It was suggested that paragraphs 2 and 3 of draft chapter V should make clear that they addressed only governmental restrictions specific to countertrade applicable at the time of the conclusion of the countertrade agreement. Those restrictions involved in particular the kinds of goods that were eligible to be offered in countertrade transactions. It was further suggested that the legal guide should alert negotiators to the possibility that restrictions of a general character concerning the export or import of goods could affect the contractual freedom of parties to a countertrade transaction. With respect to the effect of restrictions imposed after the parties had agreed on the type of goods, it was proposed that a cross-reference should be added to draft chapter XIII, where it was intended to treat the impact of such restrictions on the countertrade transaction.

41. A related suggestion was that the legal guide should advise the parties that in certain circumstances (e.g., transactions involving the transfer of technology) they might wish to ensure, prior to the initiation of the countertrade transaction, that any required export licences were obtainable. Such advice was said to be appropriate because the denial of an export licence in the context of countertrade could pose greater difficulties than a similar denial in a simple sales transaction.

42. It was suggested that the third sentence of paragraph 3 of draft chapter V was unnecessary because there was no need to reflect in the countertrade agreement mandatory restrictions on origin and source of countertrade goods.

C. Quality of goods

43. It was observed that a reference in a countertrade agreement to quality standards prevailing in a particular market or country, as described in paragraph 13 of draft chapter V, might involve mandatory regulations, non-mandatory regulations and trade usages. It was suggested that the implications of such references to quality standards should be taken into account in revising section C of draft chapter V.

44. It was suggested that paragraph 14 of draft chapter V should be redrafted so as to make clear that it dealt with the drafting of a provision in the countertrade agreement prior to the conclusion of supply contracts.

45. The Commission noted that the quality control referred to in section C.2 of draft chapter V was specific to countertrade in that it involved determining whether goods being offered for purchase conformed to quality standards set out in the countertrade agreement, rather than determining whether goods delivered pursuant to a supply contract conformed to the quality provisions of the supply contract. Quality control pursuant to a supply contract raised questions of sales law not specific to countertrade. The suggestion was made that, notwithstanding the focus of section C.2 of draft chapter V, the possibility of a pre-shipment inspection following the conclusion of the supply contract should be mentioned in paragraph 15 of draft chapter V.

46. As to the last sentence of paragraph 15 of draft chapter V, it was suggested that there should be taken into account the cases in which only some of the shipments of goods of a given type were subject to pre-contractual quality control.

47. The suggestion was made that paragraph 17 of draft chapter V should recommend to the parties that they should agree on inspection procedures and on a quick process for resolving disputes that might arise with respect to an inspector's findings. It was also suggested that the paragraph might include an explicit reference to quality arbitration.

48. In the discussion of paragraph 18 of draft chapter V concerning the effect of the inspector's finding, it was suggested that parties should be advised to deal in the countertrade agreement with the time-frame for quality control and with the notification to the parties of the results of the quality control. It was also suggested that the third sentence of the paragraph should be redrafted in order to avoid giving the impression that the inspector's report alone could result in a supply contract, absent the agreement of the parties on all of the essential terms of the supply contract. A further suggestion was that paragraph 18 should mention the possibility that the parties might agree that a negative finding would release the party committed to purchase from the countertrade commitment.

D. Quantity of goods

49. It was noted that the question of the extent of the countertrade commitment, mentioned in paragraph 20 of draft chapter V, would be more extensively discussed in the revised draft chapter III, "Contracting approach". Questions to be discussed in draft chapter III included contractual methods of determining the "countertrade ratio", i.e., the ratio between the values of the shipments in the two directions.

50. Interest was expressed in expanding paragraphs 26 and 27 of draft chapter V concerning additionality. The expanded paragraphs might, for example, address the question of whose purchases would be counted, provide illustrative provisions and give examples of the types of sources that could be used to obtain the trade volume information referred to in paragraph 27.

VI. PRICING OF GOODS (A/CN.9/332/Add.5)

A. General remarks

51. It was suggested that paragraph 1 of draft chapter VI should be modified to make clear that in some countertrade transactions the price setting mechanism established in the countertrade agreement was used to set the price for the supply of goods in both directions. It was suggested that the reference in paragraph 4 of draft chapter VI should be to the latest version of the INCOTERMS of the International Chamber of Commerce. With respect to paragraph 6 of draft chapter VI, it was proposed that the reference should be to an "anti-dumping import duty", in order to portray more accurately the typical approach. In regard to paragraph 8 of draft chapter VI, it was stated that the term "convertible currency" would be more appropriate than "foreign currency".

B. Currency of price

52. The Commission approved the approach taken in section B of draft chapter VI.

C. Determining price after conclusion of countertrade agreement

53. It was suggested that section C of draft chapter VI should take into account questions encountered in the specific contexts of technology transfer and rendering of services.

54. The suggestion was made that it should be made clear that paragraphs 21 to 24 of draft chapter VI related to the particular case of a countertrade agreement containing a commitment to conclude a future contract rather than to contract negotiations in general.

55. It was stated that, if a countertrade party expected a supply contract in one direction not to be profitable, that party normally wished to offset the expected loss when the price for the contract in the other direction was negotiated. It was suggested that such a possibility should be reflected in describing the negotiating process in draft chapter VI.

56. The Commission agreed that paragraph 26 of draft chapter VI should stress the importance of providing guidelines to delimit the mandate of a third person entrusted with the determination of price.

57. Views were expressed that the legal guide should warn the parties that determination of the price by one party, as described in paragraph 27 of draft chapter VI, was not admitted in some legal systems and that such a price setting device could lead to disputes as to the enforceability of the contract. The Commission noted that the substance of the draft paragraph would be aligned with

paragraph 61 of draft chapter III to be revised in accordance with the discussion reflected above (see para. 28 above).

58. It was suggested that the legal guide should point out that price setting by negotiation (section C.2 of draft chapter VI) and determination of price by a third person (section C.3 of draft chapter VI) could be combined in a countertrade agreement into a cumulative approach so that the determination of price would be entrusted to a third person in the event that the parties failed to negotiate a price.

D. Revision of price

59. The Commission noted that section D of draft chapter VI did not address situations of hardship, namely, when a change in economic, financial, legal or technological factors caused serious adverse economic consequences to a contracting party, thereby rendering more difficult the performance of the contractual obligations. The Commission noted that it was intended to discuss hardship clauses in a general manner in draft chapter XIII. In that connection, the view was expressed that any such discussion should include a warning that the use of hardship clauses might cause difficulties, an approach similar to the one taken in the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

60. It was suggested that paragraph 34 of draft chapter VI should indicate that index clauses could be formulated so as to link the price of the goods to be delivered in the countertrade transaction to the cost of raw materials used in the production of the goods.

IX. PAYMENT (A/CN.9/332/Add.6)

A. General remarks

61. The view was expressed that paragraph 1 of draft chapter IX should express a preference for linked payment mechanisms. The prevailing view was that the legal guide should not make a general recommendation in that regard because the appropriateness of linking payment for the shipments in the two directions depended on the circumstances of each individual countertrade transaction. It was considered appropriate to refer to the implications of linked payment mechanisms for the ability of the parties to obtain financing or credit insurance (see para. 18 above). It was also suggested that the relevance of linked payment mechanisms to various commercial types of countertrade should be discussed in the legal guide.

B. Retention of funds by importer

62. It was suggested that the word "returned" in the last sentence of paragraph 9 of draft chapter IX was not appropriate because the funds retained by the importer were never actually in the possession of the exporter.

63. Regarding the discussion in paragraph 10 of draft chapter IX on interest earned on funds retained by the importer, it was suggested that the question of which of the parties was to receive the interest should be addressed.

C. Blocking of funds

64. It was proposed that more details on the use of negotiable instruments should be added to paragraph 32 of draft chapter IX.

D. Setoff of countervailing claims for payment

65. It was pointed out that in some States setoff arrangements were subject to governmental authorization and that mention of that fact might be made in section D of draft chapter IX.

66. The view was expressed that the last sentence of paragraph 35 of draft chapter IX should be modified so as to avoid giving the impression that the only way an imbalance in the values of the shipments in the two directions could be settled would be by payment of money and not, for example, by delivery of additional goods.

67. It was proposed that section D of draft chapter IX should mention that the legislation of some States recognized setoff accounts as a distinct type of contract and that specific non-mandatory rules were applicable to fill gaps in the contract established by the parties. Terms used for such setoff accounts included "cuenta corriente", "Kontokorrent" and "conto corrente". Furthermore, it was pointed out that the possibility to set off claims under the contract might be affected by the bankruptcy of one of the parties.

68. As regards paragraph 44 of draft chapter IX, it was suggested that the reference to the Uniform Customs and Practice for Documentary Credits (UCP) should be reworded in view of the fact that banks customarily incorporated UCP into their letter of credit forms.

69. It was suggested that the meaning of paragraphs 50 and 51 of draft chapter IX concerning the settlement of an imbalance that remained at the conclusion of the period for the fulfilment of the countertrade commitment or at the conclusion of subperiods within that period should be clarified.

XII. SECURITY FOR PERFORMANCE (A/CN.9/332/Add.7)

A. General remarks

70. It was suggested that paragraph 1 of draft chapter XII should make clear that the countertrade agreement might provide that the party committed to supply goods, as well as the party committed to purchase goods, was to obtain a guarantee to secure fulfilment of the countertrade commitment. The view was expressed that the second sentence of paragraph 4 of draft chapter XII should be deleted.

B. Guarantee provisions in countertrade agreement

71. It was pointed out that the last sentence of paragraph 9 of draft chapter XII might be misread as suggesting that in all circumstances, absent a contractual provision to the contrary, the principal would remain liable upon payment under the guarantee. Reference was made during the discussion of the paragraph to the rule

in many legal systems that additional damages beyond the guarantee amount might be recoverable. It was further suggested that the paragraph should not imply that the principal had a choice either to fulfil the underlying contractual obligation or to have the guarantee amount paid.

72. The suggestion was made that a discussion of the use of counter-guarantees should be added to paragraph 13 of draft chapter XII.

73. With regard to paragraph 16 of draft chapter XII, the view was expressed that simple demand guarantees, owing to their controversial nature, should not be mentioned in the legal guide in order to avoid encouraging the use of such guarantees. The prevailing view was that the legal guide had to mention such guarantees because of the extent of their use in countertrade, though a warning should be included concerning the potential for abuse. It was recommended that, in formulating the provisions in the legal guide concerning simple demand guarantees, account should be taken of the preparatory work on a uniform law on guarantees being carried out by the Commission's Working Group on International Contract Practices.

74. The view was expressed that the legal guide should call attention to the existence in some legal systems of mandatory rules governing the validity period of guarantees.

ANNEX II

Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (proposed Arabic language version)

(The proposed Arabic language version of the Convention is reproduced only in the Arabic language version of the present report. For the discussion in the Commission, see paragraphs 63 and 64 of the report.)

ANNEX III

List of documents before the Commission at its twenty-third session

A. General series

A/CN.9/327	Provisional agenda
A/CN.9/328	Report of the Working Group on International Payments on the work of its nineteenth session
A/CN.9/329	Report of the Working Group on International Payments on the work of its twentieth session
A/CN.9/330	Report of the Working Group on International Contract Practices on the work of its thirteenth session
A/CN.9/331	Report of the Working Group on the New International Economic Order on the work of its eleventh session
A/CN.9/332 and Add.1-8	Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters
A/CN.9/333	Preliminary study of legal issues related to the formation of contracts by electronic means
A/CN.9/334	Convention on the Limitation Period in the International Sale of Goods
A/CN.9/335	Training and assistance
A/CN.9/336	Current activities of international organizations related to the harmonization and unification of international trade law
A/CN.9/337	Status of conventions
A/CN.9/338	United Nations Decade of International Law
A/CN.9/339	Bibliography of recent writings related to the work of UNCITRAL

B. Restricted series

A/CN.9/XXIII/CRP.1 and Add.1-6	Draft report of the United Nations Commission on International Law on the work of its twenty-third session
A/CN.9/XXIII/CRP.2 and Add.1-5	Annex I. Discussion on the draft legal guide on drawing up contracts in international countertrade transactions

C. Information series

A/CN.9/XXIII/INF.1/ Rev.1	List of participants

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